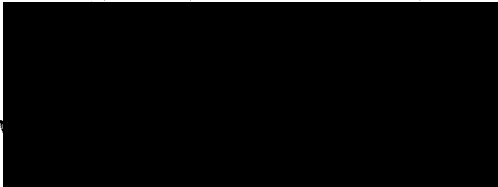




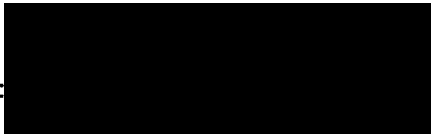
U.S. Citizenship  
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Services

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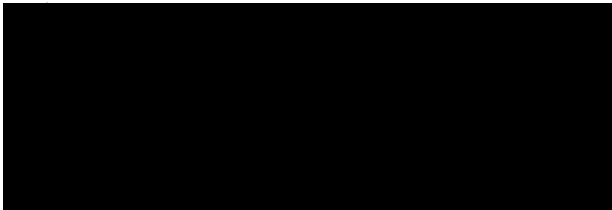
FILE: WAC 03 018 54320 Office: CALIFORNIA SERVICE CENTER Date: OCT 12 2004

IN RE: Petitioner:  
Beneficiary:




PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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**DISCUSSION:** The Director, California Service Center, denied the preference visa petition. The director granted a subsequent motion to reopen/reconsider and denied the petition again. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is an automotive service center and repair facility. It seeks to employ the beneficiary permanently in the United States as an automobile mechanic. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 28, 2000. The proffered wage as stated on the Form ETA 750 is \$734.40 per week, which equals \$38,188.80 per year.

On the petition, the petitioner stated that it was established during 1980 and that it employs six workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

In support of the petition, counsel submitted copies of the petitioner's 2000 and 2001 Form 1120 U.S. Corporation Income Tax Returns. Counsel also submitted copies of the petitioner's California Form DE-6 Quarterly Wage and Withholding Reports for the last two quarters of 2001 and the first two quarters of 2002.

The 2000 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$17,033 during that year. The corresponding Schedule L shows that at the end of that

year the petitioner had current assets of \$126,906 and current liabilities of \$100,864, which yields net current assets of \$26,042.

The 2001 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$1,223. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$76,338 and current liabilities of \$61,576, which yields net current assets of \$14,762.

The quarterly reports show that the petitioner employed five workers during one of those quarters and six workers during the other three quarters, but that it did not employ the beneficiary.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on March 27, 2003, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the petitioner establish its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements.

In response, counsel submitted the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared a loss of \$1,254 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$146,196 and current liabilities of \$74,626, which yields net current assets of \$71,570.

Counsel also submitted a statement in which he urged that the amount of the petitioner's gross receipts, its compensation to officers, and its depreciation deduction indicate its ability to pay the proffered wage. The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on May 22, 2003, denied the petition.

Counsel submitted a motion to reopen/reconsider. In that motion, counsel argued that, because the priority date is November 28, 2000, the petitioner is obliged to demonstrate the ability to pay the proffered wage during only one month and three days of 2000. Counsel also asserted that amounts shown on the petitioner's tax returns as having been paid for outside services represent payments for work which the beneficiary would perform if the petition were approved. Counsel asserted that those amounts, therefore, also represent funds available to pay the proffered wage. Counsel again asserted that the petitioner's depreciation deduction is a fund available to pay the proffered wage.

The director granted the motion. Upon reconsideration, the director was persuaded by counsel's argument pertinent to pro-rating the proffered wage during 2000, and found that the petitioner had demonstrated the ability to pay the proffered wage during 2000. The director was not persuaded, however, that the petitioner's depreciation deduction represented a fund available to pay the proffered wage. Further, the director found that no evidence in the record indicates that any portion of the petitioner's payments for outside services were for services that the beneficiary might perform. The director again denied the petition based on the petitioner's failure to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the petitioner's depreciation deduction is a "paper loss" and not an actual expense, and should therefore be included in the calculation of the petitioner's ability to pay the proffered wage. Further, counsel again asserts that the payments for outside services were for work the beneficiary would perform if employed by the petitioner. Apparently in support of that assertion, counsel submits a 2001 account detail showing \$67,000 in cash payments for outside labor.

Counsel's reliance on the petitioner's gross receipts is misplaced. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>1</sup> or otherwise increased its net income, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income.

Counsel has previously asserted that the petitioner's compensation to officers could have been reduced as necessary to pay the proffered wage. Counsel produced no evidence, however, to support his assertion that those payments are optional. Counsel did not demonstrate that none of the officers are contractually entitled to some annual amount of compensation. Further, counsel produced no evidence that the officers, the petitioner's owners, are able to support themselves independently of that income, and would thus be able to forego it.

Although counsel is correct that a depreciation deduction does not represent a specific cash outlay in the year taken, his reliance on the amount of the petitioner's depreciation deduction is misplaced. A depreciation deduction is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. Further, no precedent exists that would allow the petitioner to include its depreciation deduction in the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Counsel alleges that the amounts paid for outside labor were for services the beneficiary could perform. Counsel, however, provides insufficient evidence in support of that assertion.<sup>2</sup> The statements of counsel on

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<sup>1</sup> This might be accomplished, for instance, by demonstrating, rather than merely alleging, that the payments for outside labor, or some portion of them, were for work the beneficiary would have performed.

<sup>2</sup> Counsel submitted no evidence, for instance, that the outside labor expense was for duties ordinarily performed by automobile mechanics and no evidence of the number of hours of labor that were thus purchased. Without evidence of the number of hours of outside labor purchased annually, this office is unable to determine what portion of that outside labor expense the petitioner could have obviated by hiring the beneficiary. Without evidence pertinent to the nature of that outside labor, this office is unable to determine that hiring the beneficiary would have obviated any of that outside labor expense at all. Further, if the outside labor expense were for automotive specialties, such as painting, welding, air

appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

Counsel requests that CIS prorate the proffered wage for the portion of 2000 that occurred after the priority date. This office disagrees with that approach, notwithstanding that the director agreed. This office will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

In this case, the petitioner apparently earned the net profit shown on its 2000 tax return throughout that calendar year. This office will not pro-rate the proffered wage, considering only that portion which would have been due had the petitioner hired the beneficiary on the priority date, without also pro-rating the petitioner's net income, considering only that portion earned after the priority date.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the

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conditioning repair, or rebuilding automatic transmissions, this office would require evidence that the beneficiary is qualified to perform those specialty tasks. The only evidence of the nature of the petitioner's outside labor expense is the notation "3 CASH O.S.L." on the petitioner's account detail. That notation is clearly insufficient to show that hiring the beneficiary would have obviated all, or any, of those payments.

AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$38,188.80 per year. The priority date is November 28, 2000.

The petitioner's 2000 tax return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$17,033. That amount is insufficient to pay the proffered wage. The petitioner ended that year with net current assets of \$26,042. That amount is also insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage during that year. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2000.

The petitioner's 2001 tax return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$1,223. That amount is insufficient to pay the proffered wage. The petitioner ended that year with net current assets of \$14,762. That amount is also insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage during that year. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2001.

During 2002, the petitioner declared a loss of \$1,254 as its taxable income before net operating loss deduction and special deductions during that year. That amount is insufficient to pay the proffered wage. The petitioner ended that year, however, with net current assets of \$71,570. The petitioner has demonstrated the ability to pay the proffered wage during 2002 out of its net current assets.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2000 and 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.